

① No. 89-822 ①

Supreme Court, U.S.
FILED

NOV 20 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1989

JUAN JOSE OCORO,

Petitioner,

-VS-

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW JERSEY

ROBERT E. MARGULIES
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(201) 963-0700

Attorneys for Petitioner

On the Petition:
Robert E. Margulies

HOPP



QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was denied a substantial, fundamental due process right in a state criminal proceeding when he was not permitted to present evidence and call witnesses in a post-trial Remmer-type hearing on the issue of the substance of an ex parte, off the record communication between the trial judge and the jury?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JUAN JOSE OCORO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW JERSEY

Petitioner Juan Jose Ocoro prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey which dismissed the appeal and denied review of the conviction of petitioner Juan Jose Ocoro from a jury verdict of guilty.

OPINIONS BELOW

The New Jersey Supreme Court issued an Order dismissing the appeal and denying review that is reprinted in the appendix to this petition. A.1a. The opinion of the Superior Court of New Jersey, Appellate Division, is reprinted in the appendix to this petition. A.3a.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part as follows:

"In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor..."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows:

"...nor shall any State deprive any person of life, liberty, or

property, without due process
of law..."

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on September 21, 1989. That determination dismissed petitioner's appeal and denied review of the decision of the Superior Court of New Jersey, Appellate Division. Jurisdiction is invoked on the basis of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. PROCEEDING BELOW

On January 31, 1986, a State Grand Jury returned Indictment No. SGJ 157-86-6, charging defendant Juan Jose Ocoro and co-defendants Pedro Ernest Ramos Gonzalez and Santiago Eduardo Gomez with conspiracy to possess a controlled dangerous substance (cocaine) with intent to distribute and to possess a controlled

dangerous substance (cocaine) contrary to N.J.S.A. 2C:5-2 and N.J.S.A. 24:21-24 (Count One); possession of a controlled dangerous substance (cocaine) with the intent to distribute, contrary to N.J.S.A. 24:21-19a(1) and N.J.S.A. 24:21-19b(2) (Count Two); and possession of a controlled dangerous substance (cocaine) contrary to N.J.S.A. 24:21-20a(2) (Count Three). Defendant entered a plea of not guilty to the indictment on March 7, 1986.

On November 6, 10, 12, 13, 17, 18, 19 and 20, 1986 defendant Ocoro was tried jointly with codefendant Gomez before a jury in the Superior Court of New Jersey, Law Division. The jury returned a verdict against defendant on all counts on November 20, 1986. On January 9, 1987, defendant appeared for sentencing.

The Court merged Counts One and Three into Count Two and imposed a five year probationary term on that count. As a condition of probation, defendant was sentenced to serve 364 days in county jail. Defendant was fined \$2,500.00 and assessed a Violent Crimes Compensation Board penalty of \$25.00.

Defendant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division on January 9, 1987. An Amended Notice of Appeal was filed on January 22, 1987.

The Superior Court of New Jersey, Appellate Division, affirmed the conviction by Opinion filed March 31, 1989. (A.3a). A Notice of Appeal to the New Jersey Supreme Court as of right (N.J.Ct.Rule 2:2-1) based upon substantial constitutional errors

committed at trial was timely filed. The New Jersey Supreme Court treated the Notice of Appeal as a Petition for Certification, dismissed the appeal, and denied review by Order of September 21, 1989. (A.1a).

B. STATEMENT OF FACTS

Petitioner Juan Ocoro was arrested on January 10, 1986 and charged with possession of a controlled dangerous substance, i.e., cocaine and conspiracy to possess cocaine. Ocoro's co-defendants were arrested and the cocaine was seized earlier that day. Ocoro was arrested later when he appeared at the apartment of a co-defendant and was questioned by police, who had assumed undercover identities. After eliciting inculpatory statements from Ocoro, the police

arrested him.

After six days of trial, the jury was charged and sent to the jury room for deliberation. Prior to lunch, the Assistant Attorney General who was trying the case for the State related to the defendant's attorney that he had seen the trial judge in the jury room. The attorney for the State further related that the trial judge had told him that the jury had asked if they had to return a verdict on both defendants, and the trial judge said that he told the jury that they did.

Following this conversation between the two attorneys, the jury was allowed to go to lunch. After lunch the jury was brought into the Court room and the Court responded to a written question from the jury with the following statement:

"Also, I indicated to you and you asked me this when I discussed it with you that you can at any time choose as long as it is unanimous terminate what you want to hear."
(Emphasis added)

This statement by the judge confirmed that the judge had a discussion with the jury about something out of the presence of counsel.

After the jury resumed deliberation, defendant's attorney confronted the trial judge about his presence in the jury room. The judge then stated that he walked into the jury room only to tell the jury that at that time he could not answer their question. This statement to counsel contradicted the judge's statement excerpted above and the statement of the Assistant Attorney General who tried the case.

C. THE POST TRIAL HEARING

After appeal was taken by Ocoro, a motion was made to the Appellate Division of the Superior Court for remand so a hearing could be held on the issue of what was said to the jury by the trial judge when the ex parte, off the record communication took place between the judge and jury. The Appellate Division granted the motion and ordered that "[t]he matter is remanded to the Law Division to permit counsel to develop a record of the allegations subject to this motion."

The hearing on remand was not held by the judge who tried the case since he had to testify at the hearing. Another judge presided over the proceedings at which the trial judge, the Assistant Attorney General and defendant's trial

attorney testified.

At the hearing, defendant's trial attorney specifically recalled that he was told by the State's attorney that he had seen the trial judge in the jury room and that the judge had told the State's attorney that the jury asked if they had to return a verdict on both defendants, and the judge told the jury that they did.

The State's attorney denied that he had told defendant's attorney about the judge's statements, however, he had no specific recollection of the conversation he had with defendant's attorney.

The trial judge had no independent recollection of the matter involved and specifically relied on the previous statements made in the transcript of the official record.

Prior to the post trial hearing, the judge conducting that hearing wrote to defendant's attorney confirming the hearing judge's intention to call the jury foreperson as a witness and that the foreperson would be present at the hearing. (A.2a). On the day of the hearing, a telephone call was received from the husband of the jury foreperson informing the Court that she was ill and unable to attend.

The hearing judge then asked counsel if it would be necessary to call the other jurors. Defendant's attorney specifically requested that as many jurors as were available should be called so that a full record could be made. The hearing judge said he would be contacting the attorneys within the next week, never indicating that the hearing record would

be closed without testimony from any of the jurors. Two days later the hearing judge notified the parties that he had closed the record stating that "I have complied with the remand of the Appellate Division to develop a record of the allegations which were the subject of the motion before the Appellate Division." (A.14a).

Defendant's attorney was denied the opportunity to call the jurors, including the foreperson. Also, no evaluation of witness credibility by the hearing judge took place and no findings were made by the hearing judge.

When the matter was reviewed by the Appellate Division, the appellate court made a finding, on this incomplete record, that no legal instructions were given to the jury by the trial judge and

that the communications between the trial judge and jury were harmless.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important constitutional question of the due process requirements for a post trial hearing in a criminal proceeding on the issue of the substance of ex parte communications between the judge and jury.

The Appellate Division of the New Jersey Superior Court remanded this case to the trial Court "to develop a record" concerning ex parte communications between the trial judge and the jury during deliberations. The defendant was not allowed to call the jurors as witnesses. No reason was given for the denial of the defendant's right to

present evidence, though the Court did explain that its obligation on remand was only to "develop a record." A fact finding that the ex parte communication was not prejudicial was made by the Appellate Division. The New Jersey Supreme Court dismissed petitioner's appeal and declined review.

The Court should grant certiorari because this case raises the important and unsettled issue of the process due to a defendant in a Remmer¹ type hearing.

¹Remmer v. United States, 347 U.S. 227 (1954)

POINT I

PETITIONER WAS DENIED A SUBSTANTIAL, FUNDAMENTAL DUE PROCESS RIGHTS IN A STATE CRIMINAL PROCEEDING WHEN HE WAS NOT PERMITTED TO PRESENT EVIDENCE AND CALL WITNESSES IN A POST-TRIAL HEARING ON THE SUBSTANCE OF AN EX PARTE, OFF THE RECORD COMMUNICATION BETWEEN THE JUDGE AND JURY.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor..." This mandatory procedural requirement binds the states through incorporation in the fourteenth amendment due process clause. See Washington v. Texas, 388 U.S. 14 (1967).

There is a Sixth Amendment right "to put witnesses on the stand, as well as

the right to compel their attendance in Court." Washington v. Texas, 388 U.S. at 18. In Chambers v. Mississippi, 410 U.S. 284 (1973) the Court ruled:

"Few rights are more fundamental than that of an accused to present witnesses in his own defense."

This Court held that a post-trial hearing on the issue of juror prejudice was a sufficient procedural safeguard to a defendant's due process right in Remmer v. United States, 347 U.S. 227 (1954). The Court ruled that if there is any private communication between the judge and a juror, there is a presumption of prejudice. That presumption may be overcome after a hearing. The Court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a

hearing with all interested parties permitted to participate."

The defendant's right to a Remmer-type hearing to prove prejudice on the part of the jurors was confirmed in Smith v. Phillips, 455 U.S. 209 (1982). The defendant in that case was given an opportunity to a post-trial hearing to show the bias of a juror who had filed an application to work for the prosecutor's office. The Court, citing Dennis v. United States, 339 U.S. 162, reh. den. 339 U.S. 950 (1950), recognized that a defendant in a Remmer-type hearing must be afforded the opportunity to prove juror bias, noting that "'[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'"

In Rushen v. Spain, 464 U.S. 114

(1983), reh. den. 465 U.S. 1055 (1984), a case concerning the issue of ex parte communications between a judge and a juror, the Court in footnote 3 said that "a post-trial hearing is adequate to discover whether respondent was prejudiced by the undisclosed communications about juror Fagan's recollection." The Court went on to say that a post-trial hearing was an adequate remedy. "The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred...post-trial hearings are adequately tailored to this task."

Justice Stevens in his concurring opinion in Rushen, supra, explained that there is a "core due process right to notice and an opportunity to be heard in a meaningful manner and at a meaningful

time...in which the substance of the ex parte conversation and the extent of [the witness'] knowledge of potentially prejudicial information could be established."

Certainly the defendant's right to call witnesses is not unlimited and does not include irrelevant evidence. In United States v. Barker, 553 F.2d 1013, 1020 (6th Cir. 1977) the Court ruled that the presence of witnesses necessary to present an adequate defense is required only to the extent that the evidence will be relevant, useful and material. In the case at bar, calling the jurors was absolutely essential to the defendant's case. The only persons in the jury room during deliberations were the judge and the jury members. There was no record of what took place in the jury room, and the

judge had no recollection of what occurred. Therefore, the testimony of the jurors was absolutely essential in order to uncover what actually took place and what was said.

The fact that defendant was seeking to take testimony of jurors is also not a limiting factor when a Remmer-type hearing is held. At the post-trial proceeding petitioner needed to call jurors ~~in~~ order to ascertain the substance of the judge-jury communications, not to probe the mental processes of the jurors. "Statements concerning outside influences on a jury, occurring less frequently and more susceptible to adequate proof, should be admissible to show that the defendant was prejudiced, for here the danger to our jury system is minimal compared with the

more easily proven prejudice to the defendant." People v. DeLucia, 20 N.Y. 2d 275, 229, N.E.2d 211 (1967). The right to call jurors as witnesses for this purpose is in accordance with Fed.R.Evid. 606(b) and the law of New Jersey. State v. Weiler, 211 N.J. Super. 602, 512 A.2d 531, (App. Div. 1986), certif. denied 107 N.J. 37, 526 A.2d 130, (1986); N.J.Ct.Rule 1:16-1.

The nature and the quality of the hearing is at issue in this case. Defendant's attorney expressed to the judge the desire to call as many jurors as available as witnesses. N.J.Ct.Rule 1:16-1 limits attorney contact with jurors except by leave of Court and upon good cause shown. The defendant's attorney was following a proper and prudent course when permission of the

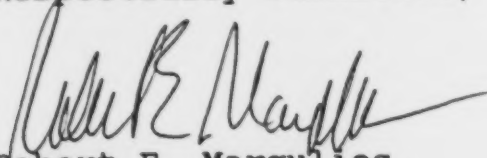
Court to call the jurors was sought. The judge did not deny this request and advised counsel that the Court would be contacting the attorneys. No contact was made and the Court closed the record before defendant was given the opportunity to present this evidence.

The refusal by the Court at the post-trial hearing to allow petitioner to present evidence by calling jurors, who were parties to ex parte communications with the trial judge, was a substantial and fundamental denial of defendant's due process rights under the Sixth and Fourteenth amendments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert E. Margulies", with a long horizontal flourish extending to the right.

Robert E. Margulies
Counsel of Record
Clifford A. Herrington
MARGULIES, WIND, HERRINGTON
& KATZ
A Professional Corporation
921 Bergen Avenue
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(201) 963-0700
Attorneys for Petitioner

Dated: November 15, 1989



APPENDIX



SUPREME COURT OF NEW JERSEY
M-48 SEPTEMBER TERM, 1989
A-119
C-223
30,388

Filed in Supreme Court
September 21, 1989
Stephen Townsend,
Clerk

STATE OF NEW JERSEY,

Plaintiff-Movant,

-vs-

JUAN JOSE OCORO,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss (M-48) the appeal (A-119) is granted.

The Court having elected to treat the matter as a petition for certification, and having considered the same;

It is ORDERED that the petition for certification of the judgment in the

Appellate Division (A-3418-86T4) is
denied.

WITNESS, the Honorable Robert N.
Wilentz, Chief Justice, at Trenton, on
this 19th day of September, 1989.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the
following is a true copy
of the original on file in
my office.

/s/ Stephen W. Townsend
Clerk of the Supreme
Court of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3418-86T4

STATE OF NEW JERSEY,
Plaintiff-Respondent.

v.

JUAN JOSE OCORO,
Defendant-Appellant.

Argued March 15, 1989 -- Decided March
31, 1989

Before Judges Gaulkin, R.S. Cohen and
A.M. Stein

On appeal from the Superior Court, Law
Division, Bergen County

Robert E. Margulies argued the cause for
appellant (Margulies, Wind, Herrington &
Katz, attorneys; Mr. Margulies and Judith
M. Katz, on the brief).

Robert E. Bonpietro, Deputy Attorney
General, argued the cause for respondent
(Peter N. Perretti, Jr., Attorney
General, attorney).

PER CURIAM

Defendant, tried with co-defendant Santiago Eduardo Gomez, was convicted by a jury of conspiracy to possess cocaine with intent to distribute (Count One, N.J.S.A. 2C:5-2; N.J.S.A. 24:21-24), possession of cocaine with intent to distribute (Count Two, N.J.S.A. 24:21-19a(1); N.J.S.A. 24:21-19b(2)) and possession of cocaine (Count Three, N.J.S.A. 24:21-20(2)). At sentencing the trial judge merged Counts One and Three into Count Two, on which he imposed a five year probationary term with a special condition that defendant serve 364 days in the County Jail. On this appeal from the judgment, defendant urges:

POINT I.

The communication between the judge and jury outside the presence of counsel constituted reversible error.

POINT II.

The confession of the co-defendant as improperly admitted in the trial in this matter in violation of Bruton.

POINT III.

The defendant's statement made to the officers must be suppressed since it was obtained in violation of the Miranda doctrine.

POINT IV.

The Fifth Amendment forbids a coerced statement from being used against a defendant in a criminal trial.

POINT V.

The due process clause of the Fourteenth Amendment requires that the statement be suppressed.

POINT VI.

The defendant's statement must be suppressed because it was obtained in violation of defendant's Sixth Amendment right to counsel.

POINT VII.

The illegality of the procurement of the initial statement taints any subsequent confession.

POINT VIII.

The erroneous and confusing jury charge requires a reversal of the conviction.

We are satisfied that the trial judge's communication with the jury outside the presence of counsel did not taint the proceedings. The trial record, as well as the trial judge's testimony at the remand hearing conducted pursuant to our April 13, 1987 order, discloses that the judge had informed the jurors only that (1) their request for a readback could not be complied with until after lunch and (2) they could terminate the readback at any time they unanimously chose. That communication does not warrant disturbing the judgment, for it clearly had no tendency to influence the verdict. State v. Auld, 2 N.J. 426, 432 (1949); State v. Sachs, 69 N.J. Super.

566, 588 (App. Div. 1961).

Nor is there any sound basis to infer that the judge had some further communication with the jury. At the remand hearing, trial counsel for defendant asserted that the Deputy Attorney General had reported that the judge had told him that the jury had asked whether they had to return a verdict on both defendants and that the judge had responded in the affirmative. But the Deputy Attorney General denied that he had any such conversation with defense counsel and asserted that the trial judge had not told him of any such inquiry from or instruction to the jury. Moreover, the trial judge testified at the remand hearing that, while he did not have any recollection of the incidents independent of the trial record, he would

only have given "housekeeping" advice to the jurors in the absence of counsel and he "would not" give any legal instructions at all. The record before us thus does not support defendant's suggestion that the judge may have given some legal instruction to the jury in the absence of counsel.

We reject the contention that the admission of co-defendant Gomez' statement was in violation of Bruton v. United States, 391 U.S. 123 (1968). The assertedly offending portion of the statement is its description of a Hispanic male, approximately 5 feet 10 inches tall, with short hair and wearing bluejeans and a jacket, as the person who had delivered the cocaine. When the Deputy Attorney General properly raised the Bruton question (R. 3:15-2(a)),

defense counsel said that the description was "so conspicuously innocuous that I don't think there's any need to say anything." Defendant cannot fairly complain of an alleged error committed with his acquiescence and, indeed, his encouragement. State v. Simon, 79 N.J. 191, 205 (1979). Moreover, Gomez himself testified as to the statement, thus satisfying the Bruton concern for the right of confrontation. — State v. Gardner, 54 N.J. 37, 44-45 (1969). Finally, given Gomez' testimony that defendant was not the person whom he had described and defendant's admission to the police that he had delivered the drugs, any asserted error was clearly harmless. See Harrington v. California, 395 U.S. 250, 254 (1969).

The various challenges to the admission of defendant's statement, raised in Points III through VII, are without merit. The record amply supports the trial judge's findings, with respect to the first set of statements, that defendant was not subjected to custodial interrogation or to mental or physical coercion or duress. The fact that he made incriminating statements to persons who in fact were undercover officers does not render those statements inadmissible. State v. McKnight, 52 N.J. 35, 52 (1968). The second set of statements to the police, preceded by proper Miranda warnings, was thus not tainted.

Finally, we are satisfied that the charge, read as a whole, gave proper and adequate guidance to the jury. See State v. Freeman, 64 N.J. 66, 69 (1973).

The judgment is affirmed.

I hereby certify that
the foregoing is a true
copy of the original on
file in my office.

/s/ Emille R. Cox, Esq.
Acting Clerk

SUPERIOR COURT OF NEW JERSEY

(SEAL)

ESSEX COUNTY COURTS BLDG.
NEWARK, N.J. 07102

CHAMBERS OF
JULIUS A. FEINBERG
J.S.C.

October 20, 1987

Robert E. Margulies, Esq.
Margulies, Wind, Herrington & Katz
921 Bergen Avenue
Jersey City, New Jersey 07306-4225

Re: State v. Gomez and Ocoro
Indictment No. S-171-86-04
Your File No. BR 6337

Dear Mr. Margulies:

Confirming our conversation of even date, I informed you that I intended to call Mary B. Smith, the Foreperson of the Jury which heard this matter, and request her appearance next Tuesday.

As a result of your consent, I spoke with Mrs. Smith who will be in at 1:30 P.M.

Very truly yours,

JULIUS A. FEINBERG, J.S.C.

JAF:jvd

cc:

Judith Margulies Katz, Esq.

John Fahy, Esq., Deputy Attorney General

William Perkins, Esq.

Honorable Alfred D. Schiaffo, J.S.C.

Honorable Charles R. DiGisi, J.S.C., P.J.

SUPERIOR COURT OF NEW JERSEY

(SEAL)

ESSEX COUNTY COURTS BLDG.
NEWARK, N.J. 07102

CHAMBERS OF
JULIUS A. FEINBERG
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October 29, 1987

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John Fahy, Esq.
Chief, Deputy Attorney General
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Hughes Justice Complex
CN 085
Trenton, New Jersey 08625

Re: State v. Juan Jose Ocoro
Docket No. SGJ157-86

Gentlemen:

In accordance with the remand of the Appellate Division, testimony was taken before me at the Court House in Hackensack on Tuesday, October 27, 1987.

William O. Perkins, Jr., Esq.; John Fahy, Esq.; and the Honorable Alfred D. Schiaffo, J.S.C., all testified.

The following Exhibits were marked in evidence:

C-1 The Affidavit of William O. Perkins, Jr., Esq.

C-2 A note from the jury marked "C-4 in evidence 11-20-86 12:00 Noon."

Robert E. Margulies October 29, 1987
John Fahy, Esq. -2-

C-3 Transcript of Trial Proceedings, Vol. VIII dated November 20, 1986.

I am satisfied that I have complied with the remand of the Appellate Division to develop a record of the allegations which were the subject of the motion before the Appellate Division. The matter marked in evidence before me and referred to herein will be submitted to the Clerk of the Appellate Division for such use as counsel may desire to make of them.

Very truly yours,

JULIUS A. FEINBERG, J.S.C.

JAF:jvd

cc: Judith Margulies Katz, Esq.
William O. Perkins, Jr., Esq.
Honorable Alfred D. Schiaffo,
J.S.C.
Honorable Charles R. DiGisi, J.S.C.,
P.J.
Honorable Peter Ciolino, A.J.S.C.
Honorable Peter Ciolini, A.J.S.C.

